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Nos. 02-1674 & Consolidated Cases

IN THE

Supreme Court of the United States

MITCH MCCONNELL, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant cases are of central interest to Cato and the Center because they present issues at the very heart of the First Amendment and offer a once-in-a-generation opportunity to reexamine comprehensively of the Constitution's treatment of core political speech.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech and government mandates, and thus touches the very core of IJ's mission and ideals.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

STATEMENT

The First Amendment framework for government regulation of election-related political speech and association has been anchored for the last generation by this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). That decision declared a compelling, though vaguely defined, government interest in preventing the corruption or the appearance of corruption of elected officials. *Buckley* also carved out various exceptions to the strict scrutiny ordinarily applied to restrictions on core political speech and association. Campaign contributions to candidates were given less protection than independent expenditures for speech in support of a candidate. So-called "express advocacy" of the election or defeat of a candidate was given less protection than other election-related political speech. And corporations and labor unions were given less protection than given to other groups for their political speech and association.

The lines defining such exceptions to strict scrutiny, however, were never particularly stable or principled, and thus have given rise to considerable litigation attempting to expand or contract First Amendment protection for election-related speech and association. The result has been a system that neither allows predictable and coherent regulation nor provides reliable protection to core First Amendment activities.

Indeed, the badly fractured opinion of the district court in these cases stands as a stark illustration of the inconsistencies and confusion that *Buckley*'s unprincipled lines have wrought. Of the three judges seeking faithfully to apply *Buckley* and its progeny, one found cause to sustain virtually all of the challenged provisions of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"). Another found cause to invalidate virtually all such provisions. And the third straddled the fence, picking and choosing various provisions and even separate phrases to sustain or reject. While appellants can discuss the particular inconsistencies of reasoning within the

fragmented opinions below, the larger point is that such fragmentation is, and will be, the inevitable result of a line of cases based upon conflicting principles that can be selectively used in support of almost any potential result.

SUMMARY OF ARGUMENT

1. *Buckley* v. *Valeo* erred by recharacterizing the most elemental aspects of representative democracy as "corrupt" and by creating unprincipled exceptions to the First Amendment protection of core political speech and association. It and its progeny should be overruled and replaced with a more consistently speech-protective jurisprudence. This Court should begin by recognizing that the value of political speech and expressive association in getting a candidate elected is not an *improper* source of influence over such candidate. That politicians will be responsive to those who support them and who, through core political speech, help persuade others to do so, is not corruption; it is democracy at its most basic. That different speakers will speak more or less according to their means and inclination, and will be more or less persuasive to the public according to a myriad of factors, likewise is not corruption. It is the freedom of speech at its most basic. Genuine corruption of elected officials involves the exchange of official conduct for some *personal* gain. The exchange of political speech or association in return for lawful official conduct if elected is *representation*. While combating genuine corruption is indeed a compelling interest, combating political influence mediated through speech and expressive association is not. The essential mechanics of democracy and free speech, whatever their pros and cons, cannot be categorized, *ipse dixit*, as corrupt under our present Constitution.

And just as attacking misconceived notions of corruption is not itself a compelling interest, neither is the attempt to eliminate an erroneous public "perception" that such democratic and free-speech fundamentals are somehow corrupt. If the public misperceives a corruption of our constitutional sys-

tem, more speech to explain the Constitution, not judicial abandonment of that Constitution, is the proper response. And if the public nonetheless continues to view our constitutional system as fostering "corrupt" practices, then the only permissible response is to change the Constitution itself by the means provided therein, not by judicial fiat based upon the mere appearance or perception of non-existent corruption.

2. Replacing the *Buckley* regime with a more coherent and workable jurisprudence also requires eliminating the various unprincipled exceptions to full First Amendment protection for core political speech and association. *Buckley* set up a series of false dichotomies between contributions and expenditures, between "express" advocacy and other forms of political advocacy, and between corporate and union speech and speech by other associations. Under a proper conception of corruption as involving official action exchanged for personal gain, not merely political support, those dichotomies collapse. Campaign contributions are just another form of expressive association, can be used only to support expressive activities, not for personal gain, and thus any influence they may generate is not corrupt. Express advocacy of the election or defeat of a candidate is indistinguishable from all other political advocacy and carries absolutely no risk of corruption properly understood. And political speech and association by corporations and labor unions pose no unique threat of corruption. The restrictions on speech and association by such entities are based on the constitutionally improper notion that speech by the economically or socially powerful can and must be restricted in order to give others a greater relative voice.

3. A return to core First Amendment principles would also require reversal of *Buckley*'s too-casual willingness to force disclosure of the identities of private citizens making expenditures or contributions for political speech either directly or in association with other such speakers. Anonymous political speech and associational privacy are powerful guarantors of the exercise of free speech, and forced disclosure is

an equally powerful tool to suppress the speech of unpopular speakers or those who would support unpopular views. Any legitimate concern with making political influence over government officials more transparent to the voting public can be accommodated by requiring the *candidates* to disclose all contributions received, including whether such contributions were made anonymously. The public itself then can decide whether to be skeptical of candidates accepting or rejecting such anonymous support and vote accordingly. Likewise with anonymous political speech itself, or associations preserving the privacy of their members or supporters, the public can judge accordingly such speech and association, and the candidates supported or opposed thereby. Public knowledge of the fact of anonymity thus obviates the need to violate such anonymity and protects speakers who might otherwise be silenced through forced disclosure.

4. Replacing *Buckley* with a more speech-protective regime consistent with the First Amendment would promptly resolve most of the specific challenges to the BCRA at issue in these appeals. The BCRA provisions restricting soft-money, electioneering communications, campaign contributions, and coordinated expenditures, requiring myriad forms of disclosure, and discriminating between well-funded and poorly-funded speakers, all would fail strict scrutiny. Absent *Buckley*'s flawed conception of corruption, none of those provisions narrowly serve compelling interests.

ARGUMENT

The fundamental flaws of *Buckley* v. *Valeo* cast a pall over any attempt to formulate a coherent jurisprudence regarding election-related speech and association. Both time and analysis have demonstrated that various aspects of *Buckley* are unworkable and indefensible. The current cases present this Court with a vital opportunity to return to core First Amendment principles and either eliminate or at least minimize the contradictions in *Buckley* and its progeny.

I. THE GOVERNMENT INTEREST IN PREVENTING CORRUPTION IS ILL-DEFINED AND OVER-INCLUSIVE.

Much of the difficulty in recent campaign finance jurisprudence stems from a flawed conception of the government interests at stake. The primary government interests asserted in support of campaign speech restrictions are the prevention of "corruption and the appearance of corruption" of elected officials. *See Buckley*, 424 U.S. at 25; *see also*, *FEC* v. *Beaumont*, -- U.S. --, 123 S. Ct. 2200, 2206 (2003) ("ban [on corporate contributions] was and is intended to 'preven[t] corruption or the appearance of corruption'") (citation omitted); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 388-389 (2000) (discussing corruption interest). But as with the asserted interest in judicial impartiality in *Republican Party of Minnesota* v. *White*, advocates of campaign speech restrictions are "rather vague" about what they mean by corruption and yet "[c]larity on this point is essential before we can decide whether" preventing corruption is "indeed a compelling state interest, and, if so, whether the [restriction at issue] is narrowly tailored to achieve it." 536 U.S. 765, 775 (2002).

A. Influence Over Elected Officials Mediated through Speech, Expressive Association, and Voting Is the Essence of Democracy and Is Not Corrupt.

Buckley focused on a government interest in preventing "the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25. This Court's recent decision in *Beaumont* similarly explained that "corruption" is to be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" *Beaumont*, -- U.S. at --, 123 S. Ct. at 2207 (citation omitted). The asserted interest in preventing "corruption," however, fails to differentiate between proper and improper influence on government officials. Without a principled basis for drawing such a distinction, the

label "corruption" simply devolves into a generic epithet addressed at any political influence that is contrary to the often unspoken preferences of the person applying the label.

The basis for a distinction between proper and improper influence over elected officials necessarily starts with the recognition that democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. Every candidate for office necessarily says to voters: "Give me your vote, give me a job as your representative, and I will give you something in return." Different candidates offer different things in exchange for being given their jobs. Some promise to lower taxes, some to provide more social services; some promise to fight for abortion rights, others to fight against abortion; some promise to bring more public works to their jurisdiction, others to reduce "pork" in politics. And every voter says to the candidates in turn: "Give me the policies and laws that I desire and I will give you my vote for a job as my elected representative. Deny me the official actions I desire and I will vote you out on your ear." The exchange of elective office for desired official conduct, and the influence over government officials that such an exchange necessarily creates, are the essence of representative democracy and neither the exchange nor the influence can be characterized as improper without indicting our democratic system as a whole.[2]

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not merely by periodic voting alone, but also by the political speech of competing

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[2] Even where the exchange of elective office support for desired public policy is expressed in terms of an explicit *quid pro quo* – vote for me and I promise to do X; we will vote for you if you promise to do X – there still is nothing *improper* about that exchange. In fact, the exchange is precisely what we want and expect it to be. Voters are entitled to vote for candidates responsive to their desires, and candidates are entitled to respond to those desires through lawful official action.

interest groups and individuals. The influence exerted through the exchange of supportive political speech for desired official action is an inherent and desirable element of a democracy that relies upon speech and elections, rather than force, to change its laws and leaders.[3] To indict the exchange of political support for official action would brand virtually *all* behavior by elected officials as corrupt and would condemn the Constitution itself.

In contrast to the fundamental democratic exchange of electoral support for desired official conduct, genuine corruption is limited to the exchange of official action for some private advantage. Bribery is the archetype of such corruption: "I'll give you cash for your *personal* benefit if you vote for an upcoming bill." But the element of private gain inherent in the concept of corruption does not and cannot include whatever personal satisfaction and benefit come from being elected to public office. And if the benefit of actually being elected cannot be deemed corrupting, neither can the potential electoral benefit from speech or association in support of a candidate be deemed corrupting. While such speech, like votes themselves, may well be exchanged for official action, such exchanges are the essence of representative democracy and may not be redefined, *ipse dixit*, as "corrupt."

The suggestion that corruption can be found in the substantial magnitude of some political influence, rather than in its mere existence, is equally unavailing. Characterizing the influence of expressive activities as "coercive" or "undue" is merely an epithet, not an explanation of how it differs from the substantial influence associated with other forms of politi-

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[3] Just as with votes, speech is routinely exchanged for the promise and performance of official conduct. A newspaper that says it will only endorse a candidate who pledges to vote for/against abortion rights, a citizens' group that says it will endorse a candidate that pledges not to raise taxes, and a candidate that promises to increase law enforcement in exchange for the endorsement of a respected anti-crime advocate, all are engaged in the same exchange embodied in the election process itself.

cal support or with the need to remain in favor with voters. Many things have an influence – indeed, even a coercive influence – on candidates' positions and actions, yet few would be considered improper.[4] The mere size or force of influence thus is not the measure of whether such influence is corrupt.

While corruption cannot be found in the mere existence or magnitude of political influence, the notion of "undue" influence might be meant to suggest influence out of proportion to the person or group wielding it. Any indictment of "disproportional" influence, however, begs the question of how much influence any given person or group *should* have in some idealized construction of the world. While each person has only one *vote*, and hence has limited influence in that sense, we have never imagined that the *speech* of each person or group should be equally influential or that the views of politicians should be based solely on broad opinion polls.

Speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech necessarily will vary.[5] But the falsely egalitarian notion that the speech of persons and groups *ought* to

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[4] Public opinion is an obvious example of something that might "coercively" influence a candidate – at least any candidate that takes seriously his or her role as a representative of constituents and who has any interest in being elected or re-elected. Vehement public opposition to a particular policy would exert a tremendously coercive influence on candidates considering such a policy. Yet that influence could not be deemed corrupt.

[5] And if an elected official is more responsive to those constituents that have a greater impact in persuading the public to vote for him or her, that is not corruption – that is simply politics. Disparities in influence are the inevitable consequence of differences in wealth, intelligence, popularity, motivation, and a hundred other factors. Such disparities might be addressed through means such as education, economic opportunity, and the like, but they can never be eliminated in a free society.

have influence in proportion to the voting strength of the speakers, and the assumption that speech in fact will have influence solely in relation to its quantity, represent fundamental misunderstandings of the principles and predicates of the First Amendment.

The *freedom* of speech means that the quantity and substance of speech *ought* to be determined by private choices, not government control. And the First Amendment assumes that, so long as government stays out of the way, the eventual influence of speech will turn on its substance, not its quantity or initial popularity, and that more speech is superior to restricted speech. Through such assumptions the First Amendment places its trust in the public, not government, to sort it all out in the end. As classically explained by Judge Learned Hand, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

Even if disparities in actual or apparent influence are troubling, the government may not attempt to equalize the political strength of different elements in society by restricting the voice of some to enhance the voice of others. *Buckley*, 424 U.S. at 48-49. The First Amendment uniquely and especially condones political influence mediated through speech and forbids government manipulation of that aspect of the political process. However imperfect or worrisome a system built on such influence may be, it is the system the Constitution established, it is better than the alternatives, and it may not simply be redefined as "corrupt" in order to avoid the First Amendment.

The exchange of political speech and association for desired official action embodies representative government. To have a coherent definition of corruption, the concept must be limited to official action exchanged for some *private* advantage, not simply for the very public advantage of getting elected. Any alleged interest based on contrary assumptions is not compelling, is not substantial, and is not even valid.

B. Eliminating the Mere Appearance of Corruption Is Not a Compelling Government Interest.

Absent a demonstrable interest in preventing actual corruption, campaign-related restrictions often are alleged to serve the interest of avoiding a public perception of unproven corruption – the mere "appearance of corruption," *Buckley*, 424 U.S. at 27 – that might shake confidence in our democratic institutions. But mere public suspicions or misperceptions that the operation of free speech is somehow corrupt are no bases for ignoring the constitutional scheme. Rather, the proper answer to such misperceptions is either more speech, the election of candidates voluntarily practicing the public's notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public's confidence. In no event are public misperceptions a justification for distorting constitutional provisions set out precisely to resist even the strongly held desires of a temporal majority.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. *Barnette,* 319 U.S. 624, 638 (1943).

Maintaining the public's esteem may be desirable for a government deserving of such esteem, but it is not a sufficient basis for avoiding constitutional requirements. The government surely could not forbid speech accusing elected officials

of corruption because they kow-tow to political polls or favor the interests of their home states, regardless whether such criticism caused the public to *believe* – rightly or wrongly – that elected officials were corrupt.[6]

If the danger from exposing or imagining a corrupt government is so great, then there should be ample incentive for more speech to counter such danger. And if more speech is insufficient to mitigate the public's contempt and distrust for the government, and to restore its confidence in our constitutional system, then presumably there will be sufficient support and motivation for a constitutional amendment.

II. All Avenues of Political Expression and Expressive Association Should Receive Full First Amendment Protection.

It is a cornerstone of the First Amendment that restrictions on political speech and association are subject to strict judicial scrutiny. Yet *Buckley* and its progeny apply a lower level of scrutiny to restrictions on campaign contributions, on express advocacy of a candidate's election or defeat, and on corporate or union speech than to restrictions on other election-related speech and association. *Beaumont*, -- U.S. at --, 123 S. Ct. at 2210; *Nixon,* 528 U.S. at 386-388; *Buckley*, 424 U.S. at 25. Such differential scrutiny is based on non-existent or irrelevant distinctions between contributions and expenditures and on misperceptions regarding what constitutes corrupt influence. A return to First Amendment fundamentals would apply strict scrutiny to all restrictions on political speech and association, including restrictions on campaign contributions, express advocacy, and corporate or union speech.

[6] The weight given to the appearance of corruption in *United States Civil Service Commission* v. *National Association of Letter Carriers* involved partisan conduct by non-elected civil service employees charged with *administering* the law, 413 U.S. 548, 564-65 (1973), and cannot credibly be translated to the behavior of *elected* officials who *make* the law, who are necessarily political, and who can and should favor the positions of their political supporters. Concerns over undue favoritism or unequal burdens are properly addressed by the Equal Protection and Takings Clauses, as well as by the next election cycle.

A. The False Dichotomy between Contributions and Expenditures.

The BCRA carries forward the prior regime of restricting campaign contributions, albeit with some modification in the amounts, a prohibition on contributions by minors, and some exceptions for candidates with well-financed opponents. *See, e.g.*, BCRA §§ 304, 307, 316, 318 & 319. And many of the BCRA's more onerous expenditure restrictions are defended, at least in part, as means of preventing circumvention of existing contribution limits and depend upon the supposed validity of such limits. The validity of contribution limits in general both is implicated by the challenges to the "minor" and "millionaire" provisions, and is "fairly embraced within the question[s]" presented regarding the BCRA's expenditure and disclosure provisions. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

As *Buckley* at least initially recognized, both contributions and expenditures "operate in an area of the most fundamental First Amendment activities," in which the "First Amendment affords the broadest protection" for individual expression and the "fundamental" right to associate. 424 U.S. at 14, 25. *Buckley* also correctly recognized that the ability to expend money for speech and to associate and pool money for group speech were fully protected by the First Amendment. *Id.* at 15-19. As with many rights, exercising the right to speak almost always costs money, especially if the speaker intends to reach a large audience. The right to speak thus necessarily encompasses the right to pay for speech or the distribution of speech, just as the right to counsel encompasses the right to

hire a lawyer and the right to free exercise of religion includes the right to contribute to a church. In each of those cases the expenditure or contribution is protected not because "money is speech" or "money is a lawyer," or "money is religion," but rather because such targeted use of money is part of the *exercise* of the right to speak, to counsel, or to free exercise of religion.

Buckley's diluted scrutiny for contribution restrictions was based on the claims that contributions involve only symbolic speech by the contributor, that any further expression is contingent on "speech by someone other than the contributor," and that the burden imposed by contribution restrictions are marginal. 424 U.S. at 21-22. Those assertions, however, are both wrong and irrelevant to the applicable level of scrutiny.

More than Symbolic Speech. The claim that contributions involve only the "undifferentiated symbolic act of contributing," unrelated to the amount of the contribution, 424 U.S. at 21, is simply incorrect. Even *Buckley* itself later acknowledged that "[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22. Just as with contributors to other advocacy groups, campaign contributors form part of an expressive association organized around a favored candidate who is both an object of the collective speech as well as a unifying spokesperson or coordinator for such speech.

Contributors thus "speak" not only through the symbolic act of contributing, but also through the speech funded by the contribution.[7] Such speech will indeed vary in both scope

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[7] *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) (association "is but the medium through which its individual members seek to make more effective the expression of their own views"); *see also*, *Buckley*, 424 U.S. at 22 (role of associations is to "effectively amplify[] the voice of their adherents"); *Nixon*, 528 U.S. at 415 (Thomas, J., dissenting) ("a contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to convey").

and reach according to the amount of contributions. And even if *Buckley*'s characterization of contributions as only undifferentiated symbolic speech were accurate, contributions to candidates would be no different from contributions to other speakers or groups and thus deserve no less protection.

Contributions Earmarked for Collective Speech. As for *Buckley*'s disparagement of the contingent and once-removed nature of the speech that results from contributions, 424 U.S. at 21, such criticism is again wrong and irrelevant to the standard of scrutiny. Unlike gifts or bribes, campaign contributions can be spent *only* to support campaign-related expression, BCRA § 313, and hence implicate purported government interests only when they *are* spent to support such expression. Because contributions only have value to a candidate when used to support political speech, both sides of the First Amendment balance turn on the same contingency, rendering that contingency irrelevant. And while the candidate may do the literal speaking that results from contributions, it is emphatically *not* true that such speech is *only* that of the candidate, rather than the speech of both the candidate and the contributors combined. That someone other than the multiple contributors utters the final words neither diminishes the expressive interest of the contributors nor distinguishes contributions from other expenditures for speech.

First Amendment Offense Not Marginal. *Buckley*'s third asserted distinction is that contribution restrictions have only a marginal impact on political expression. 424 U.S. at 21-22. But that attempted distinction is no more tenable than the previous two. The size of the First Amendment burden imposed by contribution limits is not as slight as *Buckley* suggests and, in any event, it is the character, not the magnitude, of a speech restriction that dictates the standard of scrutiny applied. Even a trifling speech tax discriminatorily imposed on messages critical of the government would be subject to strict scrutiny regardless of the size of the burden on such speech.

Contrary to *Buckley*'s suggestion, a contribution limit is not merely an "indirect[]" burden on campaign speech, "making it relatively more difficult for candidates to raise large amounts of money." 424 U.S. at 26 n. 27. There is nothing *indirect* in conditioning the amount of a candidate's expression on his ability "to raise funds from a greater number of persons," and there is nothing *indirect* in "compel[ling] people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 21-22. Rather, allowing speakers to raise and pool money only by bits and pieces, and doing so precisely *because* such money will be used for political speech, quite directly offends the First Amendment and burdens speech and association.[8]

Whether direct or indirect, however, the burden also is substantial, particularly where the aggregation of large amounts of money is essential for access to "expensive modes of communication" such as television, radio, and other mass media, which are "indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. Requiring a gardener to water a garden with a thimble rather than a pitcher plainly would burden the production of flowers, and so too with contribution limits and the production of speech. Contribution limits necessarily increase the time and expense a candidate must devote to raising money to support speech and divert such time and expense from the campaign speech itself. And they increase the burden on contributors as well, who

[8] That the burden is imposed because the money is targeted for speech is what distinguishes contribution restrictions from general income taxes or similar financial burdens that have only an incidental effect on speech and thus fall within the analysis of *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). But a restriction specifically on raising money for speech and imposed precisely because such money will be spent on speech – *i.e.*, because of its communicative impact – fails the *O'Brien* test. *Id.* at 382.

must search for less effective means of combining in support of a shared message and are likely to find numerous alternative avenues of expressive association foreclosed as well.

Contributions Are Not Corrupting. The flawed dichotomy between contributions and expenditures regarding the standard of review is compounded by the flawed claim of a greater threat of corruption from contributions. But *neither* expenditures nor contributions threaten corruption as properly understood. The *only* function of campaign contributions or expenditures is to generate political speech and the *only* value to a candidate stems from the prospect that the resulting speech will persuade voters and help the candidate get elected. If a candidate were to receive contributions for some *personal* use such as buying jewels or fancy cars, that would indeed be corruption.[9] But contributions that assist the candidate in getting elected through the entirely proper mechanism of generating political speech are no different than endorsements or votes. Because the assistance is ultimately channeled through the protected medium of political speech, it cannot be deemed corrupt.

In the end, the speech and association interests are fundamentally identical for expenditures and contributions that can be used only to support speech and the jurisprudential line separating them is incoherent. Both should be afforded the "fullest and most urgent application" of the First Amendment, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), and restrictions on either should be subject to no less than the full force of strict scrutiny. Indeed, content-based restrictions on such core political speech and association should be *per se*

[9] The fundamental line between corrupt and non-corrupt payments to candidates is reflected in BCRA § 313, which provides that a "contribution or donation described in subsection (a) shall not be converted by any person to personal use." Concern that contributions will be converted to personal use notwithstanding § 313 can be handled by audit procedures to enforce that prohibition.

invalid under the First Amendment, with no further inquiry or balancing required. *Republican Party of Minnesota*, 536 U.S. at 793 (Kennedy, J., concurring).

B. The False Dichotomy between "Express Advocacy" For or Against Candidates and Other Forms of Political Speech.

One manifestation of the incoherence of the distinction between expenditures and contributions was its immediate abandonment regarding express advocacy of the election or defeat of a candidate. Such advocacy, of course, is pure political speech, and "is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Buckley*, 424 U.S. at 48.[10]

Yet despite this Court's apparent recognition of express advocacy's undiluted First Amendment status, *Buckley* ultimately denied such election advocacy full protection because it was thought to be functionally equivalent to a contribution, would be valued similarly by a candidate, and thus could be restricted in some instances as a means of preventing circumvention of the contribution limits. 424 U.S. at 43-44 & n. 52. And it is precisely that distorted view of political speech as a means of circumventing contribution limits that has driven the BCRA's further restrictions on express advocacy and on the broader category of electioneering communications.

Perhaps if *Buckley* had reasoned in the opposite direction, the First Amendment principles at stake would have been clearer. Advocacy of the election or defeat of a candidate – whether express, implied, or otherwise – is a quintessential example of political speech and should be entirely immune

[10] But for that basic protection, it could be made a crime for an individual – not merely a corporation or labor union – to take out a small newspaper advertisement that read "Vote for Harry Browne." *See Buckley*, 424 U.S. at 40.

from regulation. While a candidate likely will value and appreciate supportive political speech, especially if it is effective in persuading others to support the candidate, that is true of all political speech. Valuing such support and being responsive to those who advocate effectively for your election is at the heart of being an elected official. From there the recognition of strong similarities between express advocacy for a candidate and contributions to that candidate's campaign fund – the very purpose of which is to generate express advocacy for the candidate – is cause to fully protect contributions, not to create a bigger hole in the First Amendment.

To instead use contribution limits to bootstrap still further restrictions on speech that might influence candidates causes the unprincipled exception to swallow the First Amendment rule. Effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means. And even if there is some salient difference in the influence generated by express, as compared to all other, advocacy, that difference should be evaluated under normal strict scrutiny by asking whether the interest in suppressing speech-mediated influence is compelling and the remedy narrowly tailored.[11]

[11] Coordinated expenditures are another example of direct speech and direct association being grouped with and scrutinized as contributions despite the complete absence of the alleged distinguishing features of contributions. Any greater influence such expenditures might have does not lower the First Amendment bar, but at most increases the governmental interest to be weighed within the existing parameters of strict scrutiny.

C. The False Dichotomy between Different Forms of Collective Associations.

Another of *Buckley*'s unfortunate legacies is the inconsistent treatment of multiple forms of collective speech. While *Buckley* and later cases applied strict scrutiny to restrictions on speech by private associations in general, this Court has given less First Amendment protection to such private associations as corporations and labor unions. *See FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-53, 256-60 (1986) ("*MCFL*").

This Court's recent *Beaumont* decision surveyed the various reasons that have been used to restrict corporations and labor unions to a greater extent than individuals or other types of expressive associations. The justifications for restricting corporate and union speech included the supposed "special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace"; the interest in preventing such wealth from being "converted into political 'war chests' which could be used to incur political debts from legislators"; the supposed protection of "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed"; and preventing the use of corporations "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Beaumont*, -- U.S. at --, 123 S. Ct. at 2206-07 (citations and quotation marks omitted).

Those arguments are not persuasive justifications for reduced scrutiny of restrictions on political speech by business corporations and labor unions. Those entities are vital associations based on the shared interests of their members – assuming voluntary purchase of stock by shareholders or payment of membership dues by workers. That those interests

are largely economic does nothing to diminish their constitutional status. Political advocacy and speech driven by economic perspectives are likely universal and, in any event, are no different than speech motivated by less worldly concerns. *Cf. NAACP* v. *Alabama*, 357 U.S. at 460 ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

Claiming that corporations possess an "unfair" advantage because they have characteristics that allow them to accumulate significant capital is no more and no less than a complaint that they are wealthy and that it is somehow wrong to use wealth to support political speech. The notion that corporations can achieve their wealth through special advantages hardly distinguishes them from other expressive associations, all of which can adopt the corporate form if they so choose. Furthermore, the very characteristics that help corporations raise money – the liquidity of reasonably priced shares of stock and the limited financial risks of stock ownership – also facilitate widespread and voluntary association of all types of citizens through the medium of a corporation. In any event, we do not examine individual speakers to see if their personal resources were obtained through some special advantage – perhaps ownership of corporate stock – and thus the cause of corporate wealth seems irrelevant to whether such wealth can be deployed for political speech.[12] Calling such wealth a

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[12] Laws and regulations targeted at the non-expressive conduct of corporations or labor unions that impose incidental burdens on expression would be evaluated under the familiar *O'Brien* test for such mixed-effect laws. Of course, in these cases, the *O'Brien* test is inapplicable because the BCRA is specifically aimed at the expressive consequences of contributions and expenditures *for* speech, rather than at any conduct itself. *See Buckley*, 424 U.S. at 17 ("Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve 'suppressing communication.'").

"war chest" to be used in return for political favors adds nothing to the analysis and fails to differentiate the wholly non-corrupt political debts incurred in return for all other forms of political speech, association, and support. *See supra* Part I.

Insofar as the perceived unfairness of corporate wealth being used for contributions or expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that is the same criticism leveled against all large contributions, regardless of source, and begs the same question of what is the "proper" amount of speech and influence. Once again, the notion that the wealthy have too great a voice is not only inadequate as a justification for lesser scrutiny of corporate speech restrictions, it is a reason itself to invalidate such restrictions. Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995).

The notion that corporate and union speech is somehow not a valid reflection of the interests of the shareholders or members, *MCFL*, 479 U.S. at 258, 260, simply ignores that such agency issues are inherent to all associations and do not diminish the speech interests involved so long as association is voluntary. All shareholders and members are free to remain affiliated or not, and do so knowing that the entities are authorized to speak in furtherance of the collective economic interests that they represent. That individuals may have other interests that conflict with their economic interests in a corporation or union – and hence conflict with a corporation's or union's speech – simply puts them to the choice of which interests are more important to them and whether to continue or terminate their association. That same choice is presented by all forms of association.

The related disparagement of corporations or labor unions as being "special," rather than ordinary, interests – with the implication that those interests are somehow less valid – also flies in the face of free-association principles. Whatever the unifying ideas or interests that motivate a particular association's expression, the government simply has no power to regulate speech on the basis of its satisfaction or dissatisfaction with those ideas or motives. The law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

Furthermore, the supposedly narrow motives and interests of different groups not only fail to diminish the constitutional protection for their expressive activities, it is actually a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Those checks and balances are designed to promote a multiplicity of competing factions in order to block domination by any single faction. Indeed, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45 (Rossiter & Kesler eds. 1999). Madison correctly recognized that "the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 48 (emphasis in original). The solution is not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunder-

stands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Finally, claiming that corporations will act as conduits to avoid individual contribution limits begs the question of the validity of such limits and is a problem easily solved by treating corporations the same as individuals and applying the *same* contribution limits.

In the end, all voluntary associations, whatever their primary motivating concerns and actual or potential wealth, collectivize and amplify the speech of their associates. Corporations and labor unions are no exception. Their expressive activity should be protected equally by the First Amendment.

III. Anonymity and Associational Privacy Remain Important Guarantors of Free Political Speech.

Buckley's casual approval of numerous disclosure requirements for speakers and contributors is inconsistent with the recognition of the right to engage in anonymous speech and associational privacy as essential aspects of the freedom of speech and association. The BCRA's numerous disclosure requirements build upon *Buckley*'s error and severely curtail the possibility of anonymous political speech and association in the election context.

Forcing speakers to reveal their identities both compels and restricts speech – they are compelled to say more than they would choose on their own, and they may be deterred from speaking at all if, by revealing their identities, they may expose themselves to various forms of harassment or retaliation for their views. Because of such concerns, the First Amendment protects the rights of individuals to engage in anonymous speech. *See Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 536 U.S. 150, 166-67 (2002); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334

(1995). Similar concerns underlay First Amendment protection of the right to associational privacy. As this Court has observed,

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association [as other types of burdens] * * *. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

NAACP v. *Alabama*, 357 U.S. at 462.

Notwithstanding the protection afforded anonymous speech and associational privacy, *Buckley* upheld various disclosure requirements on the grounds that contribution disclosures (1) provide a means of gathering data essential to detecting violations of the contribution limits themselves; (2) deter actual corruption and avoid the appearance of corruption by publicizing large contributions and expenditures and thus discouraging their use for seeking political favor; and (3) provide information to the electorate regarding who supports a candidate and thus supposedly reveal something about the candidate's views and about the interests to which he might be responsive. 424 U.S. at 66-68.

Those justifications fail to offer an adequate basis for depriving speakers and contributors of their rights to anonymity and associational privacy. First, the interest in enforcing contribution limits might well be a valid concern if, but only if, such limits are themselves valid restrictions on speech. *Cf. Buckley*, 424 U.S. at 75-76 (discussing disclosure related to invalid expenditure limits). That condition is doubtful given proper First Amendment scrutiny, *supra* Part II(A), and a correct understanding of the quite narrow government interest in preventing corruption. And even if contribution limits con-

tinue to be upheld, enforcement concerns are more than adequately addressed by record-keeping and limited disclosure to enforcement authorities themselves. Further disclosure to the public substantially adds to the speech burden without appreciably aiding enforcement of contribution limits.

Second, the alleged interest in deterring corruption and the appearance of corruption is particularly inapt if contribution limits themselves are upheld. The restrictions are so low as to eliminate even the speculative suggestion that the underlying contributions would influence a candidate. In any event, even absent such limits, large contributions and expenditures for speech simply *are not corrupt*, regardless of whether they are given in exchange for political favor. *See supra* Part I.

Third, the information value provided by disclosure is not an adequate basis for government restriction or compulsion of speech and association. Insofar as disclosure is meant to provide information about the contributors or expenders themselves, control over such information is squarely part of First Amendment freedoms. *McIntyre*, 514 U.S. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). And insofar as it is meant to provide information about a candidate, that benefit is far too attenuated to impose First Amendment burdens on third parties making contributions or expenditures. To obtain information about candidates, it is the candidates themselves who should be required to disclose contributions, and if a contribution is made anonymously, that fact can be disclosed without further requiring identification of the donor.[13] A candidate accepting

[13] If the contributor revealed his or her identity to the candidate, but asked for that information to be withheld, then disclosure of that circumstance too could be required without disclosing the contributor's identity. Of course, a candidate who disclosed having agreed to conceal from the public the identity of a known donor quite likely would lose the trust of numerous voters if the donation truly appears corrupt. Concerns regarding such contributions are thus self-correcting at the ballot box.

substantial anonymous donations may well be suspect, but the public can judge that for themselves and vote accordingly.

IV. Application of General Principles to Specific Sections of the BCRA.

The previous sections provide an alternative framework for evaluating restrictions on campaign-related speech and association that is more faithful to the First Amendment. All such restrictions should be evaluated under strict scrutiny, and the compelling interest in combating corruption should be carefully cabined to preventing the offer or acceptance of private gain for official action, and should exclude exchanges of political support mediated through speech or association. Under such an approach, essentially all of the BCRA violates the First Amendment. Almost none of those provisions serve an interest in combating genuine corruption, they would not survive true strict scrutiny, and in most instances the provisions are affirmatively antithetical to the core premises of the Constitution and the First Amendment.

For convenience, however, *Amici* will point out several of the more troubling BCRA provisions on appeal that would be invalidated under the proposed framework's renewed commitment to core First Amendment principles.

BCRA Title I: ***Soft-Money Prohibitions.*** Because political parties are private expressive associations entitled to full First Amendment protection, the restrictions in BCRA § 101 on their collection and expenditure of funds earmarked for political speech must be subject to strict scrutiny. Those restrictions would fail such scrutiny because the government's interest is virtually non-existent.

Disclosure Requirements. The requirement that political committees disclose the identities of contributors, BCRA

§ 103(a), impairs fundamental First Amendment rights of anonymity and associational privacy without adequate government interest or justification. With contribution limits in place, disclosure serves virtually no purpose. And even without contribution limits, any legitimate interest in revealing a candidate's sources of support is adequately served by disclosing the fact of anonymous contributions without disclosing the identities of the contributors.

BCRA Title II: ***Restrictions on Electioneering Communications.*** Disclosure and segregated funding requirements triggered by electioneering communications, BCRA §§ 201(a), 211, 212, also impair the rights to anonymity, associational privacy, and expressive association in general. That the restrictions are triggered by the content and presumed communicative impact of the speech renders them subject to strict scrutiny. Because electioneering communications are not corrupt, restrictions triggered by such communications serve no legitimate, much less compelling, purpose.

Coordinated Expenditures. Restrictions on broadly defined coordinated expenditures, BCRA §§ 202, 213 & 214, involve direct restrictions on speech and association subject to full strict scrutiny. Coordinated speech is not corrupt and restrictions thereon cannot survive First Amendment scrutiny.

Restrictions on Corporate and Union Funding of Speech. Prohibiting business corporations and labor unions from engaging in express advocacy and other electioneering communications, BCRA § 203, and forbidding other associations from using corporate or labor donations for electioneering communications, BCRA § 201(a), squarely suppress the expression of voluntary associations and are subject to strict scrutiny. The interests alleged for suppressing corporate and labor speech are not compelling and in some instances are patently offensive under the First Amendment.

BCRA Title III: ***Contribution Limits.*** The contribution limits contained in BCRA § 307, though higher than previous limits, nonetheless must be evaluated under, and would fail,

full strict scrutiny. Because campaign contributions cannot be converted to personal use, BCRA § 313, they have no connection to any genuine corruption and the limits thereon further no compelling government interests.

Wealthy or Popular Opponent Exceptions. The heightened contribution and political party spending limits for *opponents* of wealthy or popular candidates, BCRA §§ 304, 316 & 319, must be judged under, and would fail, strict scrutiny. The higher limits will most often apply to poorer or less popular candidates, who are actually *more* vulnerable to the supposedly corrupting influence of larger contributions. Wealthy or popular opponents – still constrained by the lower limits – are *less* vulnerable to such influences.[14] The self-evident purpose of such differential limits – equalizing the speech of differently funded candidates – is not even valid, much less compelling. *Buckley*, 424 U.S. at 48-49. Furthermore, the differential contribution limits demonstrate either that the standard $2,000 contribution limit is unrelated to any interest in fighting corruption or that such interest is insufficiently important to be pursued consistently. *See Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 186-87 (1999) (substantiality of interest in doubt when it is "offset, and sometimes outweighed, by countervailing policy considerations," where policy was "decidedly equivocal" towards interest, and where Congress was unwilling "to adopt a single national policy that consistently endorses" the interest). Sections 304, 316, and 319 thus undermine numerous other provisions of the BCRA.

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[14] *Compare Buckley*, 424 U.S. at 26 ("a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign"), *with id.* at 52 ("the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed").

* * * * *

Eliminating the errors and inconsistencies of *Buckley* and applying a consistent First Amendment framework to these and other challenged provisions of the BCRA will facilitate the sound resolution of these current and future cases. Political influence mediated through speech and association is not corrupt, and all forms of political speech and association are entitled to undiluted First Amendment protection.

CONCLUSION

For the foregoing reasons, the decision of United States District Court for the District of Columbia should be reversed insofar as it upholds the BCRA and affirmed insofar as it strikes down the BCRA as contrary to the First Amendment.

Respectfully Submitted,

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